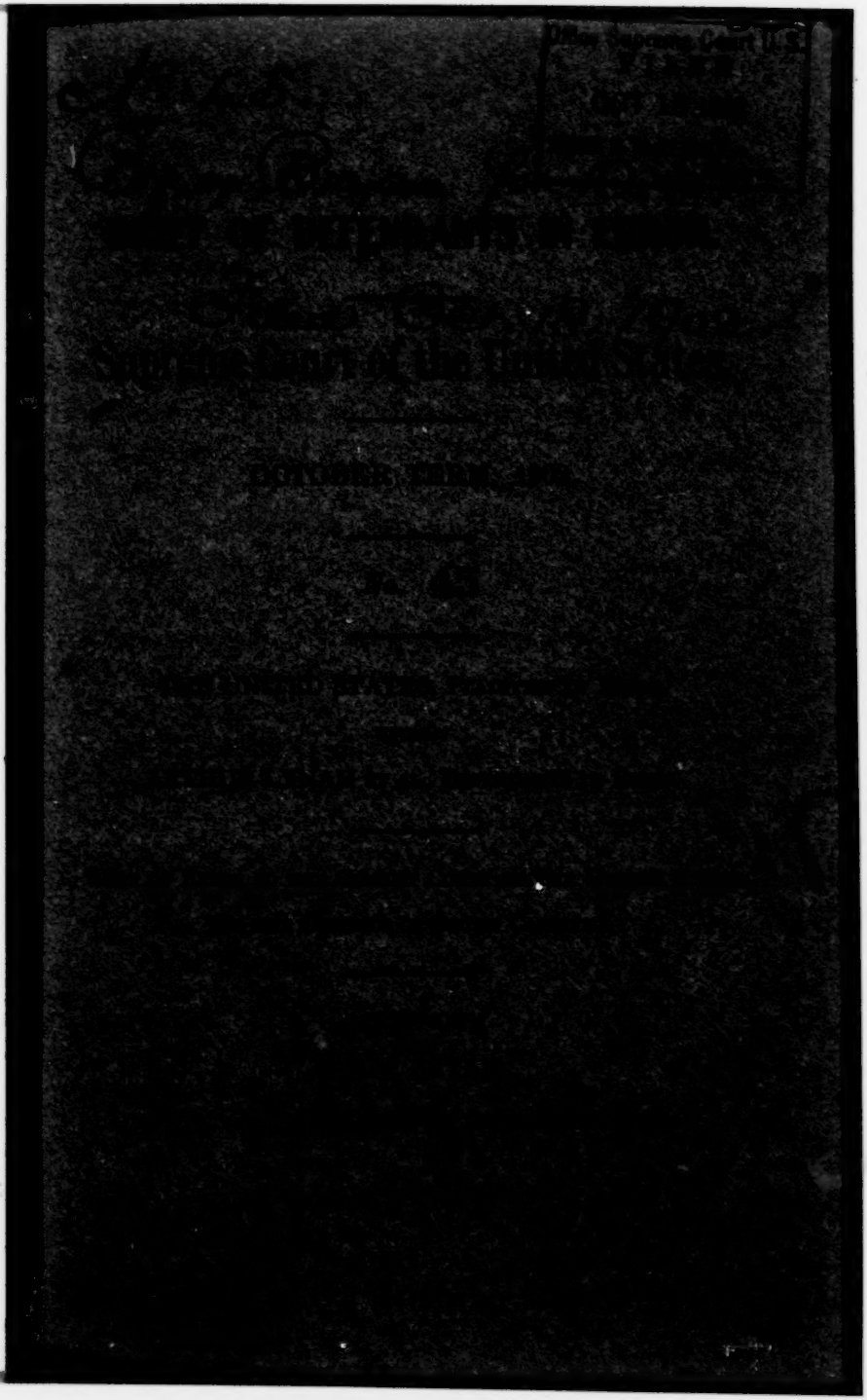

BRIEF OF DEFENDANTS IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. .

THE UNITED STATES, PLAINTIFF IN ERROR,

against

ARTHUR LYNAH ET AL., DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF OF

J. P. K. BRYAN,

Counsel for Defendants in Error.

STATEMENT OF THE CASE.

This is an action by the plaintiffs, owners of a rice plantation, against the United States on "an implied contract," and on a "claim arising under the Constitution of the United States," for value of property, such rice plantation, taken by the United States for public use, just compensation for which is due to the plaintiff under Fifth Amendment of the Constitution of the United States.

This case is brought under the Act of Congress of 3 March, 1887, 24th Stat. at Large, page 505, wherein it is provided that persons may bring suit against the United States by section 1st therein "on all claims against the United States founded upon the Constitution of the United States or any law of Congress," or "upon any contract, express or implied, with the Government of the United States," in respect to which claims the party would be entitled to redress against the United States, either in a court of law and equity or admiralty, if the United States were suable, etc. By Section 2 of the Act, the Circuit Court of the United States was given jurisdiction if the amount of such claim does not exceed ten thousand dollars. All causes brought and tried under the provision of this Act shall be tried by the Court without a jury.

Section 7 makes it a duty of the Court to deliver a written opinion to be filed in the case, setting forth the *specific findings by the Court of the facts therein* and conclusions of the Court upon all questions of law involved in the case, and to render judgment thereon.

Section 9 provides for the right of appeal or writ of error, as are now reserved in the Statutes of the United States under the conditions and limitations therein contained.

PLEADINGS.

The *Petition* and *Complaint* in this case avers (Transcript of Record, pp. 1-3):

"First. That the plaintiffs, your petitioners, are citizens of the United States, and reside as follows: Plaintiffs Arthur Lynah, J. H. Lynah, Edward Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, now reside in State and District of South Carolina; plaintiff James Lynah resides in the State of Maryland; plaintiffs Marie Glover Jenkins (born Lynah) and Kate McD.

Cunningham (born Lynah) and Anne McD. Hopkins (born Lynah) reside in the State of Georgia.

"Second. That your petitioners have a claim against the United States of America under an implied contract for compensation for the value of property taken by the United States for public use, as hereinafter stated and alleged.

"Third. That your petitioners were at the times hereinafter mentioned, and now are, owners as tenants in common of a certain plantation situated in the County of Beaufort, State of South Carolina, described as follows: "All that plantation or tract of land called Vernezobre, situate, lying and being on the Savannah River, in Saint Peters Parish, Beaufort District, and State aforesaid, butting and bounding to the north on land of the late John M. Chisolm and Elliott Guerard; to the east on lands formerly of Brisbane; to the west on Savannah River, lands of Elliott Guerard and Daniel Heyward, Esq.; to the south on lands of Daniel Heyward, Elliott Guerard and Pringle Smith, Esqs., measuring and containing two thousand one hundred (2,100) acres, more or less. *A certain tract or parcel of which said plantation, containing four hundred and twenty (420) acres, more or less, which is delineated on a map of said plantation and enclosed within red lines, hereto annexed and made part of this complaint, has been for seventy years and upwards a rice plantation on the Savannah Back River, with great labor and expenditure of money reclaimed and established and maintained as a plantation solely for the cultivation of rice, adapted thereto by the level of the lands thereof in relation to the natural level of the waters of the said Savannah River,* and depending for its proper drainage and cultivation upon the maintenance of the natural flow of the said Savannah River, in, through and over its natural channel along its natural bed to the waters of the Atlantic Ocean.

"Fourth. That for several years continuously and now continuously, the said Government of the United States of America, in the exercise of its power of eminent domain under the Constitution of the United States and by authority of the Acts of Congress, duly empowering its officers and agents thereto, in that case made and provided, did erect, build and maintain, and continuously since have been erecting, building and maintaining, and are now building, erecting and maintaining in and across the said Savannah River, in the bed of the said Savannah River, certain dams, training walls, and other obstructions, obstructing and hindering the

natural flow of the said Savannah River through, in and along the natural bed thereof and raising the said Savannah River feet at the point of and above the said obstructions and dams in the bed of the said Savannah River, and causing the said waters of the Savannah River aforesaid to be kept back and to flow back and to be raised and elevated above the natural height of the Savannah River along its natural bed at the points of the said dams, training walls and obstructions, and at points above the said dams, training walls and obstructions in said river.

"Fifth. That the said dams, training walls, and obstructions have been and are being erected and maintained in the bed of said river at a great height at divers places in said river, below the said plantation of your petitioner.

"Sixth. That the effect of the said dams, training walls and obstructions in said Savannah River upon the said four hundred and twenty acres, being of rice lands, portions of the said plantation of your petitioners, commonly known as "Verzenobre," *is that it backs the waters of the Savannah River in and upon the said plantation, and it raises and forces back the waters of the Savannah River at, in and around and upon the said plantation to the height of about two feet over and above the natural and ordinary level of the said Savannah River, existing at, in and around the said plantation at the time of its establishment as a rice plantation, and previous to the erection and maintenance of the said obstructions, training walls and dams by the United States,* and thus preventing the natural outflow of water from the said plantation necessary for its purpose of drainage and cultivation of said four hundred and twenty (420) acres, lands of said plantation, and preventing the established and proper inflow and outflow of the waters of the Savannah River necessary to the cultivation of the said four hundred and twenty acres (420) acres of lands of said plantation as a rice plantation, and *further filling the ditches and saturating the lands with water* and preventing the outflow of water from the said "Verzenobre" plantation and *submerging and destroying the crops of and preventing the drainage of the said four hundred and twenty (420) acres of lands of said plantation for cultivation for any purpose whatsoever,* and that *by the said superinduced additions of water actually invading the said rice lands of said plantation, the said four hundred and twenty (420) acres of said plantation is permanently injured and effectually destroyed.*

"Seventh. And your petitioners further show that the said acts of the Government of the United States, as aforesaid, have been done and are being done lawfully by the officers and agents of the United States under the authority of the *United States in the exercise of its powers of eminent domain and regulation of commerce under the Constitution of the United States* and the laws of Congress for the public purpose of the improvement of the harbor of Savannah and deepening the waters of the river at the port of Savannah, a port of entry of the United States and sea port of the United States of America, situated within the State of Georgia, on the Savannah River, and with the purpose of deepening and enlarging the navigable channel and highway for commerce of the said Savannah River *for the public use, purpose and benefit of interstate and foreign and international trade and commerce*, and for other public purposes, uses and benefits.

"Eighth. The plaintiffs, petitioners, further show and allege that by reason of the premises there is due and owing unto the plaintiffs, petitioners, by the United States for and in consideration of the facts hereinbefore alleged and the *taking* by the United States of the said four hundred and twenty acres, as aforesaid, of the said plantation for public uses and purposes, as in the manner and form hereinbefore alleged, the sum of ten thousand dollars ($10,000), the value of and lawful compensation for such property so taken as aforesaid.

"Wherefore, the plaintiffs, petitioners, pray judgment against the United States of America for the sum of ten thousand dollars ($10,000)."

Transcript of Record, pp. 1-3.

ANSWER.

The answer of defendant, the United States, in so far as the same is material to the legal questions raised here by the plaintiff in error, is a denial of the allegations of the complaint, "except so much of the fourth paragraph as alleges that the said United States heretofore erected certain dams in the Savannah River, pursuant to power vested in it by law, and except so much of the seventh paragraph as alleges that the said dams heretofore erected by the United States were lawfully erected by its officers and agents."

Transcript of Record, page 5.

The cause was heard by the Circuit Court of the United States on the pleadings and testimony and proofs and argument of counsel, and the Court, under the provisions of the Act of Congress, filed the following *"Findings of Fact"* and *"Conclusions of Law."*

Page 6, Transcript of Record.

JUDGMENT OF THE COURT.

"This is a proceeding under the Act of Congress, March 3, 1887, giving this Court co-ordinate jurisdiction with the Court of Claims in certain causes of action against the Unted States. The object of the proceedings is to obtain just compensation for certain lands alleged to have been taken by the Government for public purposes. The cause of action in on the implied contract arising from such alleged taking to give just compensation therefor, under the fifth amendment.

"The cause being at issue was tried by the Court, in accordance with the Act of Congress, without the aid of a jury.

FINDINGS OF FACT (PP. 6-9, TRANSCRIPT).

"I. The above petition was in compliance with the requirements of Act of March 3d, 1887, chapter 359, duly filed in the Clerk's office, Circuit Court of the United States for the District of South Carolina, on the 4th day of February, 1897, and copies thereof duly served on the United States District Attorney and the Attorney General of the United States, and said law in all respects complied with.

"II. The plaintiffs, Arthur Lynah, J. H. Lynah, Edward Lynah, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan M. Lynah, Kate McD. Cunningham, Marie Glover Jenkins, Annie McD. Hopkins, are the children and sole heirs at law and distributees of Edward Lynah, deceased.

"III. Edward Lynah, the father of the plaintiffs, at the time of his death, and for many years previous thereto, was the owner in fee simple of a plantation on Savannah River, in the State of South Carolina, known as Vernezobre, containing about 2,100 acres of high land and rice land. He held this plantation under sundry successive mesne conveyances connecting his title with a grant of the said land by the lord proprietors of South Carolina in 1736.

"IV. A certain parcel of these plantations, measuring about 420 acres, had been reclaimed by drainage and had been in actual continued use for seventy years and upwards as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah River and its ditches, drains and canals, through and by which the waters of the river were flowed in and upon the lands, and were then drained therefrom, were adapted to the natural level of the said Savannah River, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through and over its natural channel along its natural bed to the waters of the ocean.

"V. This portion of the plantation fronting on the river and dedicated to the culture of rice, extended almost up to if not quite to low water mark, and a large part of it was between mean high water and low water mark, protected from the river by an embankment. (See amendment to fifth finding of fact, p. 16, fol. 32, Record.) Through this embankment trunks or waterways were constructed, with flood gates therein. The outer opening of the trunk was about a foot or a little less above the mean low water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlets of the trunks or waterways should always be above the mean low water mark.

"VI. These lands were granted by the lords proprietors of Carolina in 1736, and lie on the Savannah Back River, a *tidal fresh water stream*, and are adapted by relation to their level to the cultivation of rice, under the natural flow of the Savannah River along its natural bed to the sea. *The whole rice culture of South Carolina is founded upon this system*, and the *policy of the colony and the State has been to grant such lands for rice culture;* and, inasmuch as it is necessary to have the lands absolutely dry to prepare the same for planting and to plant the rice crop, which is afterwards flowed while the rice is growing, and again dry while the rice is being harvested, the State has, by severe penal laws, for one hundred and fifty years protected such rice lands from destruction by continual inundation by backing up water or keeping surplus water on the lands by stopping the course of any water in

its natural flow. (Revised Statutes of South Carolina, secs. 1264 to 1267).

"It appears from the plats among the muniments of plaintiff's title that these *rice lands were reclaimed and enclosed and in a state of culture one hundred and twenty years ago,* and *probably longer.*

"VII. For several years last past and at the present time the Government of the United States, under its proper officers, authorized thereto by the Act of Congress, have been engaged in the improvement of the navigation of the Savannah River, a navigable water of the United States, this improvement being carried on by virtue of the provisions of Section 8, Article I., of the Constitution, giving to the Congress the power to regulate commerce.

"VIII. In thus improving navigation of this navigable water, the United States has built and maintained and is now building and maintaining in and across the Savannah River, in the bed thereof, *certain dams,* training walls, and other obstructions, *obstructing the natural flow of said river in and along its natural bed, and so raising the level of said river above said obstructions* and causing *its waters to be kept back and to flow back and to be elevated above its natural height* in its natural bed.

"IX. This rice plantation, Vernezobre, is above these obstructions. *The direct effect* thereof *is to raise the level of the Savannah River at this plantation* and to *keep the point of mean low water above its natural point,* so that the outlet of the trunks and waterways above spoken of in the bank of said plantation, instead of being above this point of low water mark, is now below this point. *Another direct result* was that by seepage and percolation the water rose in the plantation until the water level in the river and the superinduced addition of water in the plantation was about eighteen inches thereby. By reason of this it gradually became difficult, and has now become impossible, to let off the water on this plantation or to drain the same, so that these acres dedicated to the cultivation of rice have become boggy, unfit for cultivation and impossible to be cultivated in rice.

"X. *By the raising of the level of the Savannah River by these dams and obstructions, the water thereof has been backed up against the embankment on the river and has been caused to flow back upon and in this plantation* above the obstruction, and has *actually invaded said plantation, directly raising* the water in *said*

plantation about eighteen inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now, and the rice plantation is thereby practically destroyed for the purpose of rice culture or any other known agriculture, and is an irreclaimable bog, and has no value.

"XI. *By reason of this superinduced addition of water actually invading the said rice plantation and its destruction thereby for all purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of said rice plantation, and have been forced to pursue their calling of planting rice on other plantations below the dams. The direct result to plaintiffs is an actual and practical ouster of possession from this rice plantation, cultivated by themselves and family for many years.*

"XII. Beyond the backing up of the water on and in the plantation by reason of the dams and obstruction, *and the invasion of these lands by this superinduced addition of water at and in the plantation*, as above described, *rendered necessary by the execution of the Government's plans*, the United States is not in actual possession of these lands.

"XIII. Up to this time no other use has been discovered for these lands than for rice cultivation, *and the direct results above stated have actually destroyed the market value of the lands. They now have no value.*

"XIV. The value of these rice lands before the obstructions aforesaid were put into the river, was about thirty dollars per acre, between twenty-five and thirty dollars per acre. *The value* of the *rice plantation, 420 acres, thus destroyed, is ten thousand dollars.*

"XV. The dams and obstructions built in Savannah River by the Government of the United States, were, for several years being continuously erected, the height of the water gradually being increased, and the injury to the plantations gradually progressing, destroying its cultivation in successive fields. *Its greatest height was reached about 1895*, and within six years of the commencement of this action. The gradual effect of the dams and obstructions and jetties did not result in a *final condition of complete destruction and an enforced abandonment of this rice plantation and practical and actual ouster of plaintiffs until 1895*, and within six years of the commencement of this action."

Pp. 6-9, Transcript.

The Court further says, at p. 15, fol. 30:

"The finding of facts shows that the plaintiffs and their ancestors had been in actual exclusive *pedis possessio* of all this land, high land and rice land, down to the embankment of the river at low water mark, holding under a grant from the English crown. This long continued, actual adverse possession would give a complete title as against the world."

P. 15, Transcript Record.

The provisions of the Acts of 1744, 1783, 1785 and 1786, referred to by the Court in its sixth finding of fact, are contained in the Revised Statutes of South Carolina of 1882, 1893 and 1902, being a part of the statute law of the Colony and of the State for one hundred and fifty years.

Dams must not be erected or water let off to the injury of others.

1744, III., 609, sec. 1; 1783, IV., 540, sec. 1.

Section 1264 (1169). No person shall be permitted or allowed to make or keep up any dams or banks to stop the course of any waters so as to overflow the lands of another person without the consent of such person first had and obtained; nor shall any person be permitted or allowed to let off any reserved water to injure the crops upon the grounds of other persons.

Revised Stat. S. C. (1893), p. 435. See cases cited.

Section 1265 (1170). Every person who shall keep water during the winter upon grounds on which *rice* is to be planted the ensuing spring, shall, on the tenth day of March, in each year, open the dams which keep up the water in a sufficient manner for letting the same; and if any person shall neglect so to do on or before the time aforesaid, he shall forfeit and pay the sum of five hundred dollars for every such neglect, to be recovered upon the complaint of any person through whose land such water may pass; and it shall and may be lawful for such person to sue for the same in any Court of competent jurisdiction in the county where such offense is committed, and the one-half thereof shall be paid to the informer, and the other half to the use of the poor of such county.

Revised Stat. S. C. (1893), p. 436.

Mode of obtaining redress, if not so opened.

1744, III., 609, sec. 3; 1785, IV., 723, sec. 2.

Section 1266 (1171). Where any person has neglected to open his or her dams in sufficient manner for letting the water off the grounds before described, on or before the tenth day of March, in every year, as aforesaid, any person affected thereby may, at any time thereafter, either personally or by his agent or trustee, apply to any Trial Justice in the county for a warrant of survey. The Trial Justice shall thereupon notify the defendant of the complaint made against him, with the time and place of meeting, and summon three freeholders, disinterested persons of the neighborhood where the cause of complaint shall lie, one of whom shall be chosen by the defendant, and in case of his refusal, then by the Trial Justice, another by the complainant and the third by the Trial Justice. The freeholders thus chosen, being first sworn by such Trial Justice to determine the matter in dispute justly and impartially,

shall forthwith proceed to view the obstructions complained of, and if on view thereof, they, or a majority of them, shall be of opinion that such obstructions do or may prevent the complainant from planting his crop of *rice* in proper time, then, and in such case, the said freeholders, or a majority of them, shall cause the same to be immediately opened or removed in any way or manner they shall think necessary for the purpose of giving the most effectual relief to the party complaining, whereupon the defendant must pay all expenses attending such survey; but nothing herein shall extend, or be construed to extend, to impose any penalty on any person, or to cause his dams or banks to be opened, who shall have made through his own lands a drain or drains sufficient, in the judgment of said freeholders, to carry off the waters passing through the same as expeditiously as they could have passed through the natural course or channel in case no such banks had been erected.

Revised Stat. S. C. (1893), p. 436.

Redress for obstructing surplus water on rice grounds.

1786, IV., 728, sec. 3.

Section 1267 (1172). It shall be lawful for any person at any time between the tenth day of March and the first day of November in every year, to apply in manner aforesaid for a warrant of survey on any obstructions which he or she may conceive to impede the conveying off any surplus water on his *rice* grounds, and which, by remaining thereon, may prove any way injurious, or shall at any time hereafter make or keep up any dam or dams which shall stop the course of any water so as to overflow the lands of any person or persons whatever, without the consent of such person or persons first had and obtained, and which shall be injurious to the said person or persons, then, in either of such cases, the said Trial Justice and the freeholders by him appointed shall proceed in the same manner as is directed in the foregoing section. If, in either of the cases last mentioned, the defendant shall neglect or refuse to attend at the survey to choose a freeholder, as aforesaid, then the three freeholders who shall have been summoned by a Trial Justice shall proceed to determine the matter in dispute in the same manner as if the defendant had been present and had chosen a freeholder, which said freeholders shall, in both cases, certify to the said Trial Justice, under their hands, what shall have been by them done in the premises, the expenses attending which survey shall be paid by the party against whom the award shall be given.

Rev. Stat. S. C. (1893), p. 436-7.

Penalty for replacing obstructions for stopping up dams.

Ib., 724, sec. 4.

Section 1268 (1173). If any one, either personally or by his agent, trustee or any other person or persons acting for him, shall presume to stop up any dam or dams or replace any obstructions, in any manner whatsoever, which have been ordered to be opened and removed by any freeholders, as aforesaid, or which have been opened or removed by such person or his overseer, agent, attorney or trustee, or by order of either of them, on the said tenth day of March, until the tenth of July, every person so offending shall forfeit and pay the sum of one thousand dollars, to be recovered and disposed of in manner as provided for by Section 1265. If any person shall presume to obstruct, impede or otherwise hinder or interrupt the opening of any dam or dams, or the removing of any obstructions ordered to be opened or removed by the freeholders, as aforesaid, every person so offending shall forfeit and pay for every such

offense the sum of two thousand five hundred dollars, to be recovered and disposed of in manner aforesaid.

Rev. Stat. S. C. (1893), p. 437.

The grant of this land, as found by the Circuit Court in the third finding of fact, was repeatedly confirmed by the State of South Carolina in its several enactments of the Revised Statutes 1882, 1893 and 1902.

Section 1872 (1761). The only tenure of lands in South Carolina is that of free and common socage.

Section 1878 (1762). All and every person or persons who are now possessed of or do hold any massuages, lands, tenements or hereditaments whatsoever in the State of South Carolina, by and under any original patents, grants, deeds, indentures or poll, either made by the former lords proprietors or by their palatine or his deputy, and any three or more of the lords proprietors or their deputies or by any of their Governors, and any three or more of the said lords proprietors or the said lords proprietors' deputies, or by any other person or persons whatsoever commissioned by their palatine, and any three or more of the said lords proprietors, or by any five of the said lords proprietors, their deputies or commissioners, as of fee simple, or fee simple conditional, or for life, or for terms of years, and all other person or persons whatsoever who are now possessed of or do hold any such estate or estates, by virtue of any mesne conveyances, derived from and under all or any such original patents, grants, deeds, indented or poll, shall and may from henceforth quietly and peaceable have, hold, use, occupy, possess and enjoy all and every such messuages, plantations, lands, tenements and hereditaments whatsoever to them, their heirs, executors, administrators and assigns, respectively, according to the several tenures in such original patents, grants, deeds indented or deeds poll, and mesne conveyances or last wills, derived from under them, respectively mentioned and expressed, and that against the said State forever, and against all and every the said lords proprietors and their heirs, and all and every person and persons whatsoever, save and except as hereinafter excepted.

Rev. Stat. S. C. (1893), p. 632.

Ratification and confirmation, saving the claims of third persons.

Section 1875 (1764). All and every such patents, grants, indentures and deeds, and all other patents, grants, indentures and deeds from the said proprietors, their governors, deputies, commissioners or trustees where any lands have been so meted, or ascertained, or returned as aforesaid, and the assignments thereof, are hereby ratified and confirmed, for and notwithstanding all or any such defects in the patents, grants, deed aforesaid, or any of them, or the assignment thereof, or other defects whatsoever, in not timely executing, undue or non-execution thereof as aforesaid, saving to every person and persons whatsoever, bodies politic and corporate, their executors, administrators and assigns, other than to the State of South Carolina, and other than to the said lords proprietors and their heirs, and other than to such person and persons who do or may stand seized or possessed in trust for the said State, or for the said lords

Ib.

proprietors, all such right, title, interest and demand whatsoever which they or any of them now have and may claim of, in or to the said lands, tenements and hereditaments whatsoever, or any part thereof.

Rev. Stat. S. C. (1893), p. 634.

Upon these findings of fact, now conclusive and finally fixed as the ultimate facts in this Court, the Circuit Court of United States found the following:

CONCLUSIONS OF LAW.

"I. The cause of action accrued within six years of the commencement of this action.

"II. The Government of the United States, in undertaking this improvement of the navigation of the Savannah River, was and is exercising its lawful power in its right to regulate commerce, subject to the fifth amendment. (*Monongahela N. Co.* vs. *U. S.*, 148 U. S., 336-7.)

"III. Every riparian proprietor whose lands lie on a navigable water of the United States holds these lands with notice that the Government has the right to improve the navigation in such a mode as it deems most advisable.

"IV. If, therefore, such riparian proprietor suffer damage incidental to or consequential upon such improvement, he cannot under any circumstances treat the Government as a trespasser or tort feasor; and cannot, under the fifth amendment, demand compensation, unless there is an actual physical invasion of and taking of his land for the public purpose—a physical invasion of the real estate of the private owner and a practical ouster of his possession. (*Gibson* vs. *The U. S.*, 166 U. S., 269.)

"V. The crucial question in this case is, Was there a taking of this land in the sense of the Constitution?

"The facts found show that by reason of the obstruction in the Savannah River the water has been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The Government does not in a sense take this land for the purposes of putting its obstructions on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the Government, that water in the river must be

raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking. 'It would,' says Mr. Justice Miller, 'be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which had received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject to total destruction without making any compensation, because in the narrowest sense of that word it has not been taken for the public use.' *Pumpelly* vs. *Green Bay Co.*, 13 Wall., 177, 178. In that case the backing up of water on land was held to be a taking.

"VI. The plantation of plaintiffs being actually invaded by superinduced additions of water directly caused by the Government dams and obstructions backing up the water of the Savannah River and raising the water level at and in the rice plantations and making it unfit for rice cultivation or for any other known agriculture, and plaintiffs having been compelled thereby to abandon the plantation, and this actual and practical ouster of possession being continued and permanent by reason of the permanent condition of the flooding of the plantation and the plantation being thereby now an irreclaimable bog of no value, makes the action of the Government a taking of lands for public purposes within the meaning of the fifth amendment, for which compensation is due to the plaintiffs. *Pumpelly* vs. *Green Bay Co.*, 13 Wall., 182; *Mugler* vs. *Kansas*, 123 U. S., 668.

"VII. The Government has not gone into actual occupancy of this land, but by reason of these dams and obstructions, made necessary by this public work, and fulfilling its purpose, the water in the Savannah River has been raised at the plaintiff's plantation and has been backed up on it and remains on it so that the drainage has been destroyed and ditches filled up, and superadded water permanently kept on the land and forced up into it, making it

wholly unfit for cultivation, and the plaintiffs have thereby been practically and actually ousted of their possession. This is taking of the land for public purposes, for which compensation must be provided. *Pempelly* vs. *Green Bay Co.*, 13 Wall., 181.

"VIII. The plaintiffs are entitled to just compensation for the taking of the 420 acres of rice land. This is estimated to be ten thousand dollars, the value of the land so taken, for which amount let the plaintiffs have judgment."

Pp. 9-10, Transcript Record.

The case of *Pumpelly* vs. *Green Bay Company*, 13 Wall., 166, cited by the Court for the doctrine that the backing up of water destroying land is a taking, is the leading case in this Court.

The rubric in that case is as follows:

3. By the general law of European nations and the common law of England, it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use.

4. And the constitutional provisions of the United States and of the several States which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control.

5. It is not necessary that property should be absolutely taken in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the Constitution.

6. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation.

7. This proposition is sustained by the decisions of the Supreme Court of Wisconsin construing the provisions of the Constitution of that State on the subject, and by many other adjudged cases in this country.

8. The cases which hold that remote and consequential injury to private property by reason of authorized public improvements is not taking such property for public use have many of them gone to the utmost limit of that principle, and some beyond it, though the principle is a sound one in its proper application to many injuries so originating.

9. Lands sold by the United States with no reservation, though bordering on a navigable stream, are as much within the protec-

tion of the constitutional principle awarding compensation as other private property.

Idem, 166.

The statement of the case, as reported, is as follows:

The Constitution of Wisconsin ordains that

"The property of no person shall be taken for public use without just compensation therefor."

"With this provision in force as fundamental law, one Pumpelly, in September, 1867, brought trespass on the case against the Green Bay and Mississippi Canal Company for overflowing 640 acres of his land, by means of a dam erected across Fox River, the northern outlet of Lake Winnebago, by which, as the declaration averred, the waters of the lake were raised so high as to forcibly and with violence overflow all his said land, from the time of the completion of the dam, in 1861, to the commencement of this suit; the water coming with such violence, the declaration averred, as to tear up his trees and grass by the roots, and wash them, with his hay by tons, away, *to choke up his drains and fill up his ditches, to saturate some of his lands with water*, and to dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring him. The canal company pleaded six pleas, of which the second was the most important, but of which the fourth and sixth may also be mentioned."

Idem, p. 167.

"The plea then proceeded to say that by the act of building and completing the dam, &c., and by means of the waters of Lake Winnebago, Reed and Doty, and the State, by its board of public works, did, as *they lawfully might do, seize*, and, to the extent necessary and for the purposes of a water power and of the said improvement, take possession of the *lands and premises*, trees, grass, herbage, *drains, ditches*, &c., in the declaration mentioned, *to the extent that the same were*, as therein alleged, *destroyed, damaged, overflowed, saturated, and subverted, and otherwise injured;* that the seizure and taking possession were so made and done *under claim and color of right and title duly made by virtue of the laws of Wisconsin, and that the defendant had done as lawfully it might.*"

Idem, p. 169.

"The sixth plea alleged that by the ordinance of 1787, the Act of Congress of August 7th, 1789, the Act establishing the territorial government of Wisconsin, the Act admitting the State of Wisconsin into the Union, the Constitution of the State of Wisconsin, and the laws of the United States and of the State of Wisconsin, it was declared that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places, &c., should be common highways and forever free; that the Fox and Wisconsin Rivers and Lake Winnebago were and ever had been of the navigable waters thus referred to; that the Fox River was a navigable water leading into the St. Lawrence."

Idem, p. 170.

"And further alleged that the *dam was built and maintained under the authority of the laws of the United States* and of the State of Wisconsin, and the board of public works; that as constructed and maintained, it was and is an *essential portion of the works for the improvement of the navigability of the Fox and Wisconsin Rivers, and to the proper development as common navigable highways;* that the ordinance, the laws of Congress and of the State, granted and assigned to the defendant, the improvement and the easement, right and privilege of overflowing, &c., the lands described in the declaration, to *the extent necessary to improve the navigability of said rivers;* that under a treaty with the Winnebago Indians, in 1832, the United States patented a certain land (of which the plaintiff's was a part), to one Theresa Paquette; that she, the said Theresa, and *original grantor of the lands described in the declaration, and all the subsequent grantees thereof, including the plaintiff, purchased with full notice of, and subject to, the easement and right aforesaid.*"

Idem, pp. 170, 171.

Justice Miller, delivering the unanimous opinion of this Court, declares as follows:

"But the same plea further alleges that the Legislature of Wisconsin, after it became a State, projected a system of improving the navigation of the Fox and Wisconsin Rivers, which adopted the dam of Reid and Doty, then in process of construction, as part of that system; and that, under that Act, a board of public works was established, which made such arrangements with Reid and Doty that they continued and completed the dam; and that, by

subsequent legislation, changing the organization under which the work was carried on, the defendants finally became the owners of the dam, with such powers concerning the improvement of the navigation of the river as the Legislature could confer in that regard. But *it does not appear that any statute made provision for compensation to the plaintiff*, or those similarly injured, for damages to their lands. So that the plea, as thus considered, presents substantially the defence *that the State of Wisconsin, having, in the progress of its system of improving the navigation of the Fox River, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries.*" P. 176.

"*And counsel for the defendant, with becoming candor, argue that the damages of which the plaintiff complains are such as the State had a right to inflict in improving the navigation of the Fox River, without making any compensation for them.*"

"This requires a construction of the Constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal Government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, viz: that '*the property of no person shall be taken for public use without just compensation therefor.*' Indeed, this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law, that it is believed that no State is now without it, and the only question that we are to consider is whether the injury to plaintiff's property, as set forth in his declaration, is within its protection."

"The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit, in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an *almost* complete *destruction of the value of the land.*"

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a *consequential* result of such use of a navi-

gable stream as the government had a right to for the improvement of its navigation."

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Id., p. 177-8.

"In the case of *Sinnicksen* vs. *Johnson*, the defendant had been authorized by an Act of the Legislature to shorten the navigation of Salem Creek by cutting a canal, and by building a dam across the stream. The canal was well built, but the dam caused the water to overflow the plaintiff's land, for which he brought suit. Although the State of New Jersey then had no such provision in her Constitution as the one cited from Wisconsin, the Supreme Court held the statute to be no protection to the action for damages. Dayton, J., said '*that this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power;* that the one is inseparably connected with the other; *that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle.*' For this proposition he cites numerous authorities, but the case is mainly valuable here as showing that overflowing land by backing the water on it was considered as 'taking' it within the meaning of the principle."

"In the case of *Gardner* vs. *Newburgh*, Chancellor Kent granted *an* injunction to prevent the trustees of Newburgh from diverting

the water of a certain stream flowing over plaintiff's land from its usual course, because the Act of the Legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this, though there was no provision in the Constitution of New York, such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, under the argument of the defendant's counsel, would, like overflowing the land, be called only a consequential injury."

"If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights."

"But there are numerous authorities to sustain the doctrine that *a serious interruption to the common and necessary use* of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under *the constitutional provision it is not necessary that the land should be absolutely taken.* And perhaps no State Court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision, than that of Wisconsin. In numerous cases of this kind under the Mill and Mill-dam Act of that State, this question has arisen, and the right of the mill-owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the Court has often expressed its doubt whether the use under that Act was a public one, within the meaning of the Constitution, but it has never been doubted in any of those cases that it was such a *taking* as required compensation under the Constitution."

(And this Court cites in the foot notes, the following authorities: Angell on Water-courses, section 465a; *Hooker* vs. *New Haven and Northampton Co.*, 14 Connecticut, 146; *Rowe* vs. *Granite Bridge Co.*, 21 Pickering, 344; *Canal Appraisers* vs. *The People*, 17 Wendell, 604; *Lackland* vs. *North Missouri Railroad Co.*, 31 Missouri, 180; *Stevens* vs. *Proprietors of Middlesex Canal*, 12 Massachusetts, 466.)

"We are not unaware of the numerous cases in the State Courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of the improvements of roads, streets, rivers and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. *And when, in the exercise of our duties here,* we shall be called upon to construe other State Constitutions, we shall not be unmindful of the weight due to the decisions of the Courts of those States. *But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle*, and, in *some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle.* Beyond this we do not go, and this case calls us to go no further."

Idem, pp. 180-181.

"The sixth plea, after setting up all the matters alleged in the second, and also that by the Ordinance of 1787, and the subsequent legislation of Congress, the navigable streams of that territory were to be forever preserved as free highways, then avers that the land of the plaintiff came to him through a reservation in an Indian treaty in favor of one Theresa Pacquett, who received a patent from the United States in 1849. It is alleged that this title came to the plaintiff *burdened with an easement* in favor *of improving the navigation of the Fox River, which authorized the injuries complained of*, and of which, therefore, he could not complain."

"We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, *it retains no right to take that land for public use without just compensation*, nor does it confer such a right on the State within which it lies; and *that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream.*"

Id., p. 182.

In the next case decided by this Court, *Transportation Co.* vs. *Chicago*, 99 U. S., 635, this Court said:

"The extremest qualification of the doctrine is to be found, perhaps in *Pumpelley* vs. *Green Bay Company*, 13 Wall., 166, and in *Eaton* vs. *Boston, Concord & Montreal Railroad Co.*, 51 N. H., 504. In those cases, it was held that *permanent flooding* of private property may be regarded as a 'taking.' In those cases there was *physical invasion of real estate of the private owner*, and *a practical ouster of his possession*. But in the present case, there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

P. 642.

The case of *Pumpelley* vs. *Green Bay Company* was thus affirmed and distinguished from a case of mere inconvenience, by reason of curtailed or diminished *access*, where the owner remained in full possession and enjoyment and continued use of his premises.

In the case at bar, the Court below has, in Finding of Facts Ten and Eleven, found the facts which the Supreme Court in *Transportation Co.* vs. *Chicago*, 99 U. S., 635, declared to be the decisive elements of the doctrine declared in *Pumpelley* vs. *Green Bay Company*.

(1.) Permanent flooding.

(2.) Physical invasion of the real estate of the private owner.

(3.) Practical ouster of his possession.

See Finding of Facts, X., XI., page 8, Transcript of Record.

In addition, the Court below also found as a fact (Findings X., XI., page 8), that the plantation was "actually invaded" by "superinduced additions of water, whereby it was effectually destroyed," which this Court held was a "taking within the meaning

of the Constitution," in *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 181.

So that the Court below has found as facts, the elements on which the *Pumpelley* case originally rested, and also the ultimate facts upon which this Court further rested the doctrine in exposition of the *Pumpelly* case.

Again, this Court, in the later case of *Mugler* vs. *Kansas*, 123 U. S., 667-668, reaffirm, expound and again distinguish the *Pumpelley* case, and say:

"It is supposed by the defendants that the doctrine for which they contend is sustained by *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 166. But in that view we do not concur. That was an action for the recovery of damages for the overflowing of the plaintiff's land by water, resulting from the construction of a dam across a river. The defence was that the dam constituted a part of the system adopted by the State for improving the navigation of Fox and Wisconsin Rivers; and it was contended that as the damages of which the plaintiff complained were only the result of the improvement, under legislative sanction, of a navigable stream, he was not entitled to compensation from the State or its agents. The case, therefore, involved the question whether the overflowing of the plaintiff's land, to *such an extent that it became practically unfit to be used*, was a taking of property, within the meaning of the Constitution of Wisconsin, providing that 'the property of no person shall be taken for public use without just compensation therefor.' This Court said it would be a very curious and unsatisfactory result, were it held that, 'if the Government refrained from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Pp. 177, 178.

"These principles have no application to the case under consid-

eration. The question in *Pumpelley* vs. *Green Bay Company* arose under the State's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the State, exerted for the protection of the health, morals and safety of the people. That case, as this Court said, in *Transportation Co.* vs. *Chicago*, 99 U. S., 635, 642, was an extreme qualification of the doctrine, universally held, that 'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him any right of action. It was a case in which there was a 'permanent flooding of private property,' a 'physical invasion of the real estate of the private owner, and a practical ouster of his possession.' His property was, *in effect, required to be devoted to the use of the public*, and, consequently, he was entitled to compensation."

"As already stated, the present case must be governed by principles that do not involve the power of eminent domain in the exercise of which property may not be taken for public use without compensation."

Mugler vs. *Kansas*, 123 U. S., 667, 668.

It is to be remembered that in repeating what was said in *Transportation Co.* vs. *Chicago*, the Court adds another element of exposition in the words:

"His property was, *in effect*, required to be devoted to the use of the public, and consequently he was entitled to ~~possession~~ compensation."

In other words, although the United States do not go into actual possession of the land permanently flooded and thus taken, the owner is thus practically put out of possession and accustomed use, and thus, *in effect*, the land is required to be devoted to the use of the public.

Again, in *Gibson* vs. *United States*, 166 U. S., 269, this Court again recognizes and affirms the *Pumpelley* case in all the particulars above mentioned and distinguish it again from a case of *access* denied or impaired; and repeat again the language of *Transportation Co.* vs. *Chicago*, quoted in full above.

166 U. S., 269-276.

And again, in the latest case of *Scranton* vs. *Wheeler*, 179 U.

S., this Court, in its last utterance, cite and affirm the principle of the *Pumpelley* case, and say:

"Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use, within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this Court has announced a rule that will embrace every case. But what has been said in some cases involving the general question will assist us in determining whether the present plaintiff has been denied the protection secured by the constitutional provision in question."

"In *Pumpelley* vs. *Green Bay Company*, 13 Wall., 166, 181, the Court construed a provision of the Constitution of Wisconsin declaring that 'the property of no person shall be taken for public use without just compensation therefor;' observing that it was a provision almost identical in language with the one relating to the same subject in the Federal Constitution. In that case, it appeared that a public improvement in a navigable water was made under local statutory authority, whereby the plaintiff's land was permanently overflowed, and its use for every purpose destroyed. Referring to some adjudged cases which went, as the Court observed, beyond sound principle, it was said that, 'it remains true that where real estate is *actually invaded by superinduced additions of water*, earth, sand or other material, or by having any artificial structure placed on it, so as to *effectually destroy* or impair its usefulness, it is a *taking* within the meaning of *the Constitution*, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle.'"

"That case was relied upon in *Transportation Co.* vs. *Chicago*, 99 U. S., 635, 642, as establishing the invalidity of certain municipal acts looking to the improvement of a public highway. But this Court said that 'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the

constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority.' It was observed in the same case that the extremest qualification of the doctrine was that found in *Pumpelley's* case, and that case was referred to as holding nothing more than that 'the permanent flooding of private property may be regarded as a "taking," ' because there would be in such case a 'physical invasion of the real estate of the owner, and a practical ouster of his possession.' "

179 U. S., pp. 153-4.

It is, moreover, interesting to know that the principle decided by this Court in *Pumpelly* case, which arose on the Fox and Wisconsin Rivers, was thereafter recognized and followed by Congress in improvement of those rivers, and the Government of the United States succeeding to the rights of the Improvement Company, actually paid for the lands flowed and thus *taken* theretofore. This appears in the case of *United States* vs. *Jones, Adm., et al.*, 109 U. S., 513.

The rubric is:

"1. The power to take private property for public uses, in the exercise of the right of eminent domain, is an incident of sovereignty, belonging to every independent government, and requiring no constitutional recognition, and it exists in the Government of the United States. *Boom* vs. *Patterson*, 98 U. S., 406, cited and approved.

"2. The liability to make compensation for private property taken for public uses is a constitutional limitation of the right of eminent domain."

P. 513.

"In July, 1870, Congress passed an Act 'for the improvement of water communication between the Mississippi River and Lake Michigan by the Wisconsin and Fox Rivers;' by which, among other things, the Secretary of War was authorized to ascertain the sum which ought to be paid to the Green Bay and Mississippi Canal Company for the transfer of its property and rights of property in the line of water communication between *Wisconsin River* and the mouth of *Fox River,* including its locks, dams, canals and franchises, or so much thereof as, in his judgment, should be needed; and for that purpose to join with the company in the appointment of a board of arbitrators."

P. 514.

"Some of the dams constructed had caused the *lands* of several

parties to be *overflowed*, and in the estimate of the amount to be paid by the United States *no account was taken of the liability of the company for such damages.* The question, therefore, soon arose whether the payment of these damages devolved upon the United States; and *this question was submitted by the Committee of Commerce of the House of Representatives to the Secretary of War, and by him was referred to the Assistant Judge Advocate General.* That officer held that liability for the damages *incurred from the flowage of water* on the lands of others, caused by the works constructed, followed the property transferred, and devolved on the United States."

P. 515.

And it appears by this case, that the same was paid by the United States as compensation. This Court, in the discussion of the question, says:

"There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and, as said in *Boom* vs. *Patterson,* 98 U. S., 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution, and in the Constitution of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power."

109 U. S., 518.

Here again is a distinct recognition of the doctrine of the *Pumpelley* case, both by the Executive and Legislative Departments and by this Court.

The principle of the *Pumpelly* case has also been recognized in *Kaukauna Water Power Company* vs. *Green Bay and Mississippi Canal Company,* 142 U. S., 254.

The rubric is:

"A State Legislature may authorize the taking of land upon or riparian rights in a navigable stream, for the purpose of improving its navigation, and if a surplus of water is created, incident to the improvement, it may be leased to private parties under authority of the State, or retained within control of the State; but so far as land is taken for the purpose of the improvement, either for the dam itself or the embankments, or *for the overflow, or so far as water is diverted from its natural course* or from

the uses to which the riparian owner would otherwise be entitled to devote it, such owner is *entitled to compensation.*"

Kaukauna Water Power Co. vs. *Green Bay and Mississippi Canal Co.*, 142 U. S., 254-5.

This Court say:

"It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the centre or thread of the stream, subject, if such stream be navigable, to the right of the public to its uses as a public highway for the passage of vessels. *Jones* vs. *Pettibone*, 2 Wisconsin, 308; *Walker* vs. *Shepherdson*, 2 Wisconsin, 384; S. C., 4 Wisconsin, 486; *Norcross* vs. *Griffiths*, 65 Wisconsin, 599. In *City of Janesville* vs. *Carpenter*, 77 Wisconsin, 288, 300, it is said of the riparian owner: 'He may construct docks, landing places, piers and wharves out to navigable waters, if the river is navigable in fact; but if it is not so navigable, he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes. Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired, even for public use, 'without compensation,' or 'without due process of law,' and 'it cannot be taken at all for any one's *private* use.' With respect to such rights, we have held that the law of the State, as declared by its Supreme Court, is controlling as a rule of property. *Barney* vs. *Keokuk*, 94 U. S., 324; *Packer* vs. *Bird*, 137 U. S., 661; *Hardin* vs. *Jordan*, 140 U. S., 371."

Kaukauna Co. vs. *Green Bay &c. Canal*, 142 U. S., 271-2.

Again this Court say:

"The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose is doubtless a proper exercise of the authority of the State under its power of eminent domain."

Idem, 142 U. S., 273.

"So far, however, as land was actually taken for the purpose of this improvement, either for the dam itself or the embankments, or for the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner would

otherwise have been entitled to devote it, such owner is *undoubtedly entitled to compensation.*"

Idem, p. 276.

"The only authority by which private property could be *taken or overflowed* was one derived from the State or General Government; whatever appropriation was made or injury done to such lands, was done solely for the benefit of the public, *and it was right the public should pay the compensation therefor.*"

Idem, p. 278.

"The question of compensation is one separate and apart from the transfers of which this property was the subject, but one which *in honor as well as in law*, was chargeable upon the public."

Idem, p. 279.

The *Pumpelly* case has been followed, also the case of *King* vs. *United States*, 59 F. R., 9.

EMINENT DOMAIN—FLOWAGE OF LANDS—GOVERNMENT DAMS.

"The flooding of a plantation by a Government dam, so as to render it unfit for cultivation, is a taking for public use, requiring compensation, although the government actually occupies no part thereof."

P. 9.

3. "The Government has not gone into actual occupancy of this land. But by reason of this public work, occasioned by the public work fulfilling its purpose, the water in the Savannah River has been raised at plaintiff's land, has been backed on it so that the drainage has been destroyed, the water kept on the land, and forced upon it, making it finally wholly unfit for cultivation. This is a taking of the land for public purposes, for which compensation must be provided. *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 181, p. 12."

From this review it is clear that this leading case of *Pumpelly* vs. *Green Bay Co.* has been affirmed, and its principle recognized in this Court, from the time of its announcement by a unanimous Court up to the present time, in every opinion upon this subject. Its doctrine is now a fixed and a fundamental principle in the law

of eminent domain and a fixed limitation of the power of the Government of the United States to regulate commerce.

To the same effect are the concurrent views of the text writers.

Lewis on Eminent Domain, thus states the doctrine:

"Sec. 67. Works Which Set Back the Water and Cause a Flooding of the Lands Above.—The right to have a stream flow as it is wont by nature, includes the right to have the water flow off from one's premises as it is accustomed to do, and this right is property. Where works are constructed below the lands of a proprietor, such as a bridge, or dam, or alteration of the channel, which cause the water to set back and overflow the land of such proprietor, there is a violation of such right, and if the works are authorized by law, there is a *taking*, for which compensation must be made." (97).

(97.) The cases which support this proposition are very numerous. The leading cases are the following, and a number of other cases therein cited from the States of New Hampshire, Massachusetts, New York, Indiana, Maine, New Jersey, Alabama, Illinois, Missouri, Vermont, Pennsylvania, Arkansas, Georgia, Mississippi, Iowa, Minnesota, Michigan, North Carolina, South Carolina, Texas, Virginia, Wisconsin, and the Circuit Court of Appeals of several Circuits, all of which cases are fully cited in foot note to sec. 67, page 90, 1st volume, second edition, of Lewis on Eminent Domain.

To the same effect, see Mills on Eminent Domain, sec. 30, page 33. Randolph on Eminent Domain, sec. 14, page 139, says:

"The rule in Pumpelly's case represents the prevailing opinion." (See cases cited.)

It is upon these express and oftrepeated decisions of this Court, and upon the overwhelming weight of authority in the States of this Union, and the now prevailing opinion of eminent text writers on the law of Eminent Domain, that the decision of the Court below rests. That the backing up of water on lands bordering on a navigable stream and permanent flooding thereof is a taking, within the meaning of the Constitution, for which just compensation must be provided.

SECOND PROPOSITION.

The second principle upon which the decision of the Court below rests, is that power to regulate commerce exercised by Congress in

the improvement of a navigable river is subject to the limitations of the Fifth Amendment to the Constitution, and when private property is taken for, and in the course of such improvements, that just compensation must be provided. This is the doctrine reaffirmed in several cases by this Court.

In the case of *U. S.* vs. *Monongahela Co.*, 148 U. S., 312, this Court say:

"But like other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitation imposed by this Fifth Amendment, and can take only on payment of just compensation."

P. 336.

This doctrine was asserted by this Court in the unanimous opinion in this case of *Monongahela Co.*, in its constitutional fullness for the protection against governmental invasion of private rights to the extent of holding void that part of an Act of Congress which expressly provided for the taking of the State franchise of the Monongahela company in a navigable river without compensation. In other words, that whatever the attitude of the Government be in the taking, and whatever Congress by express enactment might ordain in disregard of the constitutional provision, this Court would enforce the constitutional mandate in protection of the private rights of the citizen.

And in the case of *Scranton* vs. *Wheeler*, 179 U. S., 153, this Court say: "Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution, and, of course, in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

Id., 153.

After this full statement of the legal position of the Court below on the facts found, we can better consider the Exceptions of the United States, plaintiff in error.

EXCEPTIONS OF PLAINTIFF IN ERROR.

FIRST EXCEPTION.

The Court erred in holding that the direct result of the Government works of improvement in the Savannah River is an actual and practical ouster of possession of the rice plantation in question.

This finding complained of is a *finding of fact* by the Court below which is contained in Finding XI. of the Findings of Fact, page 8, folio 18, of the Transcript of Record, which is in these words: "The direct result to plaintiffs is an actual and practical ouster of possession on this rice plantation, cultivated by themselves and family for many years." This finding of fact is made clear by another finding of fact of the Court in Finding X., as follows:

"X. By the raising of the level of the Savannah River by these dams and obstructions, the water thereof has been backed up against the embankment on the river, and has been caused to flow back upon and in this plantation above the construction, and has actually invaded said plantation, directly raising the water in said plantation about eighteen inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now, and the rice plantation is thereby practically destroyed for the purpose of rice culture or any other known agriculture, and is an irreclaimable bog and has no value."

P. 8, folios 17-18.

It this appears that these lands, which in Finding IV. of the Finding of Facts, p. 7, "had been in actual and continual use for seventy years and upwards as a rice plantation used solely for this purpose," that is, as long as the memory of man could speak by actual testimony, and which in Finding VI. was, "As appears from the plats among the muniments of plaintiff's title," were reclaimed as rice lands and enclosed and in a state of culture one hundred and twenty years ago and probably longer, "were made an irreclaimable bog of no value and practically destroyed for the purpose of rice culture or any other known agriculture (Finding X. of Findings of Fact, page 8), and all this happened as Court finds, by the raising of the level of the Savannah River by these dams and obstructions (Finding X.).

Inasmuch as this is a Finding of Fact of the Court below, it is not subject to an assignment of error here, because all these find-

ings of fact have the effect of a special verdict, and are the ultimate facts, not reviewable by this Court. Under the Act of Congress, writ of error only brings up questions of law.

Moreover, the Court finds in Finding XI., that "by reason of this superinduced addition of water actually invading the said rice plantation and its destruction thereby for all the purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of the rice plantation and have been forced to pursue their calling of planting rice on other plantations below the dam." It is upon these facts that the Court below declares and finds as a fact that the direct result is an actual and practical ouster of plaintiffs from the possession of their rice plantation.

The language of the Court below upon the facts found is the language of this Court in commenting upon the *Pumpelley* case. It will be remembered that the flooding of the land in the *Pumpelley* case was described in the declaration as invading the land and "choking up his drain, filling up his ditches and saturating some of his lands with water," 13 Wallace (p. 167), and this Court says, at page 177 of *Pumpelley* case, "that the nature of the injuries set out in the declaration are such that it worked *almost complete* destruction of the value of the land" (p. 177).

It was upon this state of fact that this Court held that it remains true that when the real estate is actually "invaded by superinduced additions of water so as to effectually destroy or impair its usefulness, and it is a taking within the meaning of the Constitution," 13 Wall., p. 181.

Commenting on this case of *Pumpelley* vs. *Green Bay Co.* and facts thereof, this Court declared in *Transportation Co.* vs. *Chicago*, that this was a "*practical ouster of possession*," 99 U. S., 642.

This Court repeated this language in the case of *Mugler* vs. *Kansas*, 123 U. S., 668, adding the words, "his property was, *in effect*, required to be devoted to the use of the public, consequently he was entitled to compensation."

This language is again finally repeated by this Court in the late case of *Scranton* vs. *Wheeler*, 179 U. S., 154.

It thus appears that this assignment of error fails, because the language of the Court below in this case is the exact language of this Court used on five different occasions in declaring that under the fact, of *Pumpelley* case, which the Court below has found to

be the facts in this case, there was an actual and practical ouster of possession.

Again, inasmuch as the Court below has found an actual and practical ouster of possession, and moreover has found that this invasion of the rice plantation by superinduced addition of water actually invading such plantation and permanently flooding it and destroying it, was caused "by the raising of the level of the Savannah River by these dams and obstructions, and thereby the owner was compelled to abandon the plantation (Findings X. and XI., page 8), this Court has said in similar cases it could not disregard the finding of the Court below.

In *United States* vs. *Alexander*, 148 U. S., 192, where there was a statute for compensation for *direct injury*, this Court said, "we see no reason why we should disregard the finding of the Court below, 'that by reason of the construction of said tunnel the said well of water was drained and destroyed.' And we regard such a finding as proof that the owners of the property suffered a *direct* injury."

So in this case this Court would regard the finding of fact by the Court below, that the destruction of the plantation was, in the language of Finding of Fact X., caused "by the raising of the level of the Savannah River by these dams and obstructions," *proof of direct* results, found also as facts, that is, the invasion by water and superinduced addition of water destroying the plantation and making it an irreclaimable bog of no value and driving the owners to pursue their calling in plantations below the dam.

There cannot possibly be a case of more actual and complete and practical ouster than the condition of these claimants, who having themselves, and their forefathers for genrations, plowed, and sowed and hoed and reaped these fields as dry land, and watered them for irrigation continuously within the memory of man, cannot now set foot upon them at seed time or harvest withiut sinking in a bog, cannot plow them or sow them nor reap any harvest, and to whom in the language of the Court below the land is without value.

SECOND EXCEPTION.

"The Court erred in holding as follows: 'The facts found show that by reason of the obstruction in the Savannah River the water has been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition

of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The Government does not in a sense take this land for the purpose of putting its obstructions on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the Government that water in the river must be raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking.'"

Page 12.

This is the fifth finding of law by the Court.

The facts here recited and summarized are a part of the facts found in Findings Ten and Eleven of the Findings of Fact.

These shew:

(1.) That by reason of the obstructions in the Savannah River the water has been directly backed up against the embankment on the river and the banks *on and in this plantation.*

(2.) The superinduced addition of water actually invading it.

(3.) The destruction of its drainage and of the plantation for all practical purposes.

(4.) The Government "forces back the water of the river *on the land* as a result necessary to its purpose."

The other Findings of Fact Ten and Eleven not referred to in this Conclusion of Law, but more fully stated in Conclusion Six of Law (p. 10), are:

(1.) Permanent condition of flooding of the plantation.

(2.) Plaintiffs having been compelled thereby to abandon the plantation and this actual and practical ouster of possession being permanent.

And are to be read in connection with this partial statement of fact in Conclusion of Law Five.

These elements being the facts found, the Conclusions of Law Five and Six, that they constitute a "taking" within the meaning of the Constitution requiring just compensation, fully appears on the review above of the *Pumpelley* case, and its exposition by this Court in the several cases above cited confirming, enforcing and illustrating its doctrine.

In these conclusions of law, the Court below was but following strictly the path of this Court.

THIRD EXCEPTION.

The Court erred in holding that the erection and maintenance of Government works in the bed of a navigable tidal river, for the improvement of the navigation thereof, whereby the water in said river is backed up against the banks of a rice plantation lying on said river, and destroying the drainage thereof, amounts to a taking of the said plantation for public use.

It will be noted in this Exception that in this error alleged to the law as found by the Court the specification has not set out the part referred in *totidem verbis*, as required by Rule 21, nor does it quote from any finding of law or of fact by the Court.

It is to be noted again that in framing this exception that the plaintiff in error have not stated fully all the facts which the Court finds, but have omitted the principal fact and have stated only the secondary fact. The principal fact found by the Court is the flooding, as follows: "By the raising of the level of the Savannah River by these dams and obstructions the water has been backed up against the embankment on the river and has been caused to flow back *upon* and *in* this plantation above the obstruction, and *has actually invaded said plantation, directly raising the water* in said plantation about 18 inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now."

P. 8, fol. 17.

This is the main fact found by the Court. This permanent flooding of course destroys the drainage. To emphasize this the Court find, as an independent fact in finding IX., "The direct effect thereof is to raise the level of the Savannah River at this plantation and to keep the point of mean low-water above its natural point, so that the outlet of the trunk and water ways above spoken in the bank of said plantation instead of being above this point at low-water mark is now below this point." In other words, the river at low water (that is, "the main, the permanent river," as it is called by Chief Justice Marshall in *Handy* vs. *Anthony*, 5 Wehaton, page 374, being the natural flow of the river to the sea, without the influence of the tide, backing it up,) has by these dams itself been backed up above all of the ditches and drains and

water ways of the plantation, so that the total permanent effect on this tidal fresh water river by the Government works both at the high and low water is to back up, flood and imprison its waters on, upon and in this plantation to its complete destruction for agriculture and the driving away of the tillers of the soil for over a century. This is not a mere case of prevention of water flowing out—that is mere surface drainage destroyed, as this exception would seem to imply.

It is a case of destruction by river water flowing back upon and in the plantation, and actual invasion and flooding by the river directly! We cannot escape the facts.

"Finding of fact X. By the raising of the level of the Savannah River by these dams and obstructions the *water thereof* has been backed up against the embankment on the river and has been caused to *flow back upon* and *in this plantation* above the obstruction and has *actually invaded said plantation* directly raising the water in said plantation about 18 inches, which it is impossible to remove from said plantation. This *flooding* is the permanent condition now and the rice plantation is thereby practically destroyed for the purpose of rice culture or any other known agriculture, and is an irreclaimable bog and has no value."

P. 8.

Finding of fact XI.

"By reason of this superinduced addition of water actually invading the said rice plantation and its destruction thereby for all purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of said rice plantation and have been forced to pursue their calling of planting rice on other plantations below the dam. The direct result to plaintiffs is an actual and practical ouster of possession of this rice plantation cultivated by themselves and family for many years."

P. 8.

On these findings this is not simply the destruction of the surface drainage found by the Court, but it is also a flooding of the land by the backing up of the river, which of course necessarily involves the destruction of drainage.

In the leading case of *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 167, as we have seen, the allegation and fact in that case was, as it must be in every case of destruction by backing up of water, that "result was to choke up his *drains*, fill up his *ditches* and

saturate some of his lands with water." This is one result of backing up of the river, just as in this case it is alleged in our complaint that the backing of the Savannah River, among other things, filled the ditches and saturated the land with water. Page 3, folio 5. But as alleged, and as the Court below found, it did more; it permanently flooded and destroyed the plantation by a superinduced addition of water actually invading the plantation.

Upon the facts as found in full by the Court without omission of vital facts, we rest this case on the authority of the *Pumpelley* case as expounded by this Court, in the light of which this exception is of no avail.

FOURTH EXCEPTION.

The Court erred in holding that a riparian owner of rice lands dependent for their irrigation and drainage upon the natural flow of the waters of a tidal river is entitled to compensation by the Government, under the fifth amendment to the Constitution, for damages arising from the construction and maintenance of Government works for the improvement of navigation of said river, erected and maintained wholly within the bed of said river, by which the mean low-water level of said river is raised and the natural drainage of the said lands destroyed.

Here again there is a violation of the rule of this Court, 21, that the assignment should contain the specification in *totidem verbis* of the particular matter of law excepted to. Failing to do this this assignment of errer omits the facts which the Court found and upon which it rests its judgment. By this assignment of error it would appear that the only result of the facts found was that by the Government works only the mean low-water level "of the said river is raised and the *natural* drainage of said lands destroyed," whereas, as matter of fact, the Court found not only that the low-water level of the Savannah River was raised, that is, that the "main, the permanent river" (without the effect of the tide) was backed up and the permanent effect was to destroy the drainage, but the Court also found as direct result of the Government dams and obstructions, (1) That the waters of the Savannah River are backed up against the embankment on the river and flowed back *upon* and *in* this plantation and has actually invaded said plantation. That this actual invasion of the river directly raises the water in the plantation eighteen inches,

which it is impossible to remove from said plantation. That this flooding is permanent and that the plantation is destroyed for the purpose of agriculture and is an irreclaimable bog of no value." (Finding X., p. 8.)

In other words, that this is not simply the backing of the water preventing the natural drainage from the plantation outward, but it is the backing of the water of the Savannah River, actually invading the plantation, flowing back on, upon and in the plantation to its destruction, and that this is a permanent flooding.

And the Court further finds that this superinduced addition of water actually invading the plantation from the river and destroying this plantation has compelled plaintiffs to abandon the plantation and the direct result is an actual and practical ouster of possession. (Finding XI., page 8.)

The judgment of the Court rests not on a partial statement of its findings, but on the entire statement, and it is proper in assigning error to state the whole facts, which this assignment of error does not do, either in words of the Court or in the words of counsel. When all the facts are stated upon which the conclusions of law rests, its correctness becomes manifest in the light of *Pumpelley* case and the decisions of this Court expounding and differentiating same.

FIFTH EXCEPTION.

The Court erred in holding that the property of the plaintiffs has been taken by the Government for public use.

SIXTH EXCEPTION.

The Court erred in holding as follows: "The plaintiffs are entitled to a just compensation for the taking of the 420 acres of rice land."

SEVENTH EXCEPTION.

That the Court erred in holding that the plaintiffs are entitled to recover upon the facts found by the Court in this action.

EXCEPTIONS V., VI. AND VII.

We submit that these exceptions cannot avail upon the statement of the case heretofore in this Brief and decisions of this Court as heretofore set forth in full above.

EIGHTH EXCEPTION.

The Court erred in failing to hold that the intention of the Government in the erection and maintenance of the works of improvement in question was only to improve its own property, and not to acquire the property of another.

The error here alleged is that the Court failed to hold an alleged *intention* of the Government.

A.

By inspection of the pleadings no issue of fact is made as to what the intention of the Government was.

B.

The Court has made no finding of fact as to what the intention of the Government was, and so far as it is a matter of fact no error can be assigned to the failure of the Court to make a finding which neither appears in issue in the pleadings, and upon which the record does not disclose any request of the Court to make any finding, nor does it appear that there was any evidence before the Court upon which the Court could find, as matter of fact, what the intention of the Government was, and it therefore cannot be assigned as error in the Court below not making any finding upon the same.

C.

Again as matter of law, from the facts that were actually found, there is no presumption that the Government of the United States did not intend to take, or require, the property of these plaintiffs. On the contrary the necessary intention of the Government was to take these lands because it was "rendered necessary by the execution of the Government plans," as specifically found by the Court below in Finding of Fact XII., page 8. The actual invasion of these lands by the superinduced addition of water by the backing of Savannah River by these dams rendered necessary by the Government's plans, surely implies on the part of the Government under the limitations of the Fifth Amendment and the operation of the *Pumpelley* case as a principle of law, an intention to take the lands.

D.

Even if the Government did not actually intend to take these

lands within the constitutional meaning, or the mind of the Government was absolutely vacant upon the question whether they intended to take them or not, still, inasmuch as it has been found, as matter of fact, that their permanent flooding and practical ouster of plaintiff's possession which has been done by the Government as necessary in the execution of its plans, is a taking within the meaning of the Constitution under principles and cases decided by this Court, the intention of the Government would not effect the right of the citizen to protection under the Constitution of the United States.

In the *Pumpelley* case, 13 Wallace, page 166, the statute of improvement did not make any provision for compensation to the plaintiff, and the clear intention was that the Government did not intend to take the land so far as its intention could be gathered, either from its legislative or from its executive action. Notwithstanding that, however, and because of the *actual facts* of the case and the taking of the land within the meaning of the Fifth Amendment of the Constitution rendered necessary for the execution of the Government plans, the Court held the citizen entitled to compensation for the land actually taken by the backing up of the waters.

In the later case of the *Monongahela Co.* vs. *U. S.*, 148 U. S., 312, even as against the express intention of the Act of Congress in forbidding compensation for the property of the citizen actually taken or destroyed by the Government, in the exercise of the right to regulate commerce in the improvement of a navigable river, this Court held the Constitutional mandate higher than the legislative or executive intention. The facts in that case are as follows:

The Act of Congress providing for condemnation of the company's locks and dams in the Monongahela River:

"*Provided*, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall *not* be considered or estimated."

148 U. S., p. 313.

This Court said:

"The principal question at bar is whether the proviso in the River and Harbor Act of August 11, 1888, is valid."

Idem, 320.

The attitude of the Government, as stated by this Court, was:

"On behalf of the Government, on the contrary, it was claimed by the district attorney, and held by the Court below, that the right of the United States to regulate and absolutely control the navigation of the Monongahela River was supreme and paramount; that it was not within the power of the State to grant to any corporation or persons a *franchise in*, or connected with, the navigation of said river which was not wholly subordinate to the *rights of the United States;* that any franchises granted by the State had, as matter of law, necessarily within it, as a condition, that it *might be terminated at any time by an act of the United States*, and that, therefore, no injury *entitled to compensation* could accrue to any party claiming such franchise, by reason of the exercise of such paramount right by the United States."

P. 320, *Idem.*

In concluding its opinion against this contention of the Government this Court say:

"These are all the questions presented in this case. Our conclusions are, that the Navigation Company rightfully placed this lock and dam in the Monongahela River; that, with the ownership of the tangible property, legally held in that place, it has a franchise to receive tolls for its use; that such franchise was as much a vested *right* of property as the ownership of the tangible property; that the right of the National Government under its grants of power to *regulate commerce*, to condemn and appropriate this lock and dam belonging to the Navigation Company, is subject to the *limitations imposed* by the Fifth Amendment, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to *take tolls*, as well as for the value of the tangible property; *and that the assertion by Congress of its purpose to take the property does not destroy the State franchise.*"

P. 344-5, *Idem.*

And this Court enforced payment as compensation for property of which the Monongahela River was deprived, *i. e.*, its franchise against the *intention* of an Act of Congress.

It thus appears that whether there was any actual *intention* on the part of the Government, either the legislative or executive department is immaterial, this question is determined as matter of law upon the legal effect of the ultimate facts found, and not by any arbitrary standard of intention or non-intention on the part of the Government, its agents or officers.

NINTH EXCEPTION.

The Court erred in failing to hold that plaintiff's title to the rice land, lying between high and low water on a tidal river, was subservient to the right of the Government to cause the waters of said river to be held back thereon for the benefit of navigation without compensating the owners for damages resulting therefrom.

It cannot be assigned as error of law that the Court failed to hold that the title of the plaintiff was subservient to such alleged rights of the Government, inasmuch as no such issue was raised in the pleadings and it does not appear that the Court below was asked to pass upon this question. Indeed it appears in this record in the assignment of error for the first time in this case. The pleadings are as follows:

The plaintiffs allege the title to this plantation in paragraph third of the complaint.

P. 2, Record.

The United States defendant in its answer alleges no knowledge or information sufficient to form a belief as to the allegation of paragraph third of the petition and complaint. (P. 5, fol. 10.) This is a denial of title and in effect it is the defense of the general issue.

The defense that this title of the plaintiffs' which is found to be absolute by the Court is *subservient* to the rights of the defendant is nowhere set up in the answer, and was not an issue in the case. The defense of a *servitude* is an affirmative defense and must be specially pleaded. But in this case we have no affirmative defense of such servitude, no allegation and no issue, and not presented to the Court below, but presented here for the first time to this Court on a question not even made in the record. This Court has often declared it will not consider such a question.

II.

This assignment of error wrongly assumes that the finding of fact on the part of the Court was that the whole of the rice lands were between mean high and low water on a tidal river. On the contrary, in the words of the finding of the Court, "that portion of the plantation fronting on the river and dedicated to the culture of rice extended almost up to if not quite to low water mark and a large *part of it* was between mean high water mark and low

water mark, protected from the river by an embankment." See amendment to the fifth Finding of Fact, page 16, fol. 32.

By examination of the plat, page 12, of record, it is under the finding that *a part* only of lot "No. 1, containing 443 acres," reclaimed and enclosed within the red lines, has a level between mean high water and low water. This finding of fact does not apply to the rice plantation as a *whole*, but only applies to certain part of it, which depression and inequalities exist behind the banks of all fresh water streams. By the finding of the Court, the rice plantation as such was before the dams above the mean high water level of this tidal river and, as is well known in rice planting, was flooded as a whole for irrigation on the *spring tides*.

Moreover it is found by the Court as a fact that the whole plantation was "protected from the river by an embankment" and by this embankment the lands have been "enclosed and in a state of culture for a hundred and twenty years and probably longer, as appears by the plaintiffs' muniments of title, in addition to the fact found of actual continual use as a rice plantation for seventy years and upwards, which is as far as the memory of man can go."

Findings of Fact IV., V. and VI., page 7.

And this possession was an "actual exclusive *pedis possessio*."

P. 15, fol. 30.

The fact that within the river embankment in the rice plantation there are depressions between the mean high water level and the mean low water level of this tidal river has not affected the culture of this rice plantation in all its history since its reclamation; it is only by the backing up of the water of the Savannah River, by reason of these dams, upon and in this rice plantation and permanent flooding, has this rice plantation been destroyed. The Court finds that the value previous to the backing up of the water was ten thousand dollars; since the backing up of the water the value is nothing. The Court finds that for 120 years this property has been reclaimed, enclosed and in a state of culture, and probably longer. The Court finds to-day it is permanently flooded and an irreclaimable bog. That part between the level of mean high water and mean low water is equally effected and destroyed as a part of a rice plantation as that above the ordinary high water.

The title to this rice plantation including the depression between mean high water and mean low water is found to be absolute by the Court. It has been confirmed three times by the Legislature of South Carolina: S. C. Revised Stat. of 1873, 1882, and 1893.

It is found by the Court that the whole rice culture of South Carolina is founded upon this system and the policy of the colony and the State has been to grant such lands for rice culture; that it is necessary to have the lands dry to prepare the same for planting and to plant the rice crop, which is afterwards flowed while the rice is growing and again dry while the rice is being harvested. That the State has for one hundred and fifty years protected such rice lands from destruction by backing up water on them. (Finding V., page 7.)

Such being the facts the general law is plain that even if this whole rice plantation were between ordinary high water and low water on a tidal river granted by the State for such purposes and protected from the river by an embankment, and actually enclosed, reclaimed and devoted to agriculture for over a century, once the shore, not the bed of the river, it has become private property absolute, and any public right of navigation and of fishery therein has ceased and any trust for the public in the State, or thereafter in the United States, has ceased; such public right, being defeasible by actual occupation, reclamation, enclosure, possession and tillage for over one hundred and twenty years, and that such lands between mean high and low water have become private property in the absolute sense, subservient to no easement and which cannot be taken, by backing up the water on them and destroying them, without compensation.

And in addition that in the State of South Carolina the public trust for navigation is only of the beds of rivers below the *low water;* but that the shore of a tidal river is grantable to the individual absolutely.

LAW OF SOUTH CAROLINA.

The local law of South Carolina on the title of lands between ordinary high and low water has been clearly set forth by the Circuit Judge (who delivered the opinion in this case) in the case of *Chisolm* vs. *Caines*, 67 F. R., p. 290-291, which we reproduce here as a convenient summary and refer to:

"The right of the sovereign over marsh tide lands is determined by the local law. In an elaborate opinion, the Supreme Court, in *Shively* vs. *Bowlby*, 152 U. S., 1, 14 Sup. Ct., 548, reviews the law of all the States, and concludes the review thus:

"The foregoing summary of the laws of the original States, shows that there is no universal rule on the subject, but that each State has dealt with the lands under the *tide waters* within its borders according to its own views of justice and policy; reserving its own control over such lands or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it is considered for the *best interests of the public.*"

In *Lowndes* vs. *Board*, 153 U. S., 1, 14 Sup. Ct., 758, the Court says:

"The questions in this case are mainly of a local character, in respect to which the settled rules of decision in the Courts of the State are controlling. They relate to the form of action, the title of the plaintiff to submerged lands in Huntingdon Bay, and the special defense of the defendant."

See, also, *Hardin* vs. *Jordan*, 140 U. S., 371, 11 Sup. Ct., 808, 838.

"The uniform rule in South Carolina has been to treat marsh lands as subject to grant, to grant them, and to tax them when granted. 4 St. at Large, 627; 5 St. at Large, p. 39, secs. 4 and 6; 6 St. at Large, 7; 7 vol. Stat., 151; *State* vs. *Pacific Guano Co.*, 22 S. C., 50; *State* vs. *Pinckney, Id.*, 488; *Frampton* vs. *Wheat*, 27 S. C., 293; 3 S. E., 462; *Oak Point Mines*, 22 S. C., 593; *Chamberlain* vs. *Railroad Co.* (S. C.), 19 S. E., 743. The grant in question covers the marshes, and has been recognized by the colonial assembly of the province of South Carolina. Nor is this in conflict with the general law. In Hale's Treatise, De Jure Maris, 'a great authority' (*Shively* vs. *Bowlby*, 152 U. S., at page 11, 14 Sup. Ct., 548), chapter 6, under the head 'Concerning the Ownership in Property which a Subject may Have in the Seashore and Maritime Increments, &c.,' he says, 'The seashore and the maritime increases belong, *prima facie*, to the king; yet they may belong to the subject, in point of propriety, not only by charter or grants thereof there can be but little doubt, but also by prescription or usage.' Discussing the shore of the sea, he says that there are three sorts of shores, according to the various tides: (1) The high spring tides at the equinoctial. The lands they overflow do not, *de jure Communi*, belong to the crown; 'for such spring tides many times overflow ancient meadows and salt marshes, which

yet unquestionably belong to the subject, and this is admitted of all hands.' (2) The spring tides, happening monthly. 'The lands overflowed by these fluxes ordinarily belong to the subject, *prima facie*, unless the king hath a prescription to the contrary.' (3) 'Ordinary or neap tides, which happen between the full and change of the moon, and this is what is properly *littus maris*. * * *' Touching this kind of shore, viz: that which is covered by the ordinary flux of the sea, is the business of our present inquiry: (1) *This may belong to a subject;* (2) *it may not only belong to a subject in gross*, but it may be *parcel of a manor;* (3) It may *not only be a parcel of a manor*, but, *de facto, it many times is so*. See note to *Mather* vs. *Chapman*, 16 Am. Rep., 60."

"The law in New Jersey is like that in South Carolina:

"All navigable waters within the territorial limits of the State, and soil under such waters, belong in actual propriety to the public. The riparian owner, by the common law, has no peculiar rights to this public domain, as incidents of his estate. The privileges he possesses by local custom or by force of the wharf act, to acquire such rights, can, *before possession has been taken*, be regulated or revoked at the will of the Legislature. The result is that there is no legal obstacle to a grant by the Legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark." *Stevens* vs. *Railroad Co.*, 34 N. J. Law, 532.

"In the *City of Hoboken* vs. *Pennsylvania R. Co.*, 124 U. S., 656, 8 Sup. Ct., 643, the question was as to the validity of a grant of marsh land in fee for exclusive use of the defendant. After a most elaborate and learned argument, the Court gave its opinion, concluding:

"Under this grant the land conveyed is held by the parties on the same terms on which all other lands are held by private persons under *absolute* titles, and every previous right of the State of New Jersey therein, whether proprietary or sovereign, is transferred and extinguished, except such sovereign rights as the State may lawfully exercise over *all other* private property."

"It would seem that there is a great distinction between the shores of the great ocean, the beds of harbors, the *channels* of rivers and highways of commerce, and these *mud shoals* cast up

by the currents on the sides of harbors and streams. The former must always be kept open for public use, commerce, trade and pleasure. The latter can be separated from any public use, and can be vested in individuals or corporations, at the will of the sovereign power. *They are not aids to, but obstructions to, navigation,* and can be utilized for the public good in any way the sovereign may decide. And, when it can be done without detriment to the lands and waters remaining, they can always be disposed of, and *vested absolutely* in private persons. *Illinois Cent. R. Co.* vs. *Illinois,* 146 U. S., at pages 456, 457, 13 Sup. Ct., 110."

Chisolm vs. *Caines,* 67 F. R., 290, 291.

In the case of the *State* vs. *Pacific Guano Co.,* 22 S. C., 83-4, the Court say, speaking of the public trust in navigable waters, that the "beds of such channels *below low water* mark" are not held by the State as vacant lands, but in trust for the public; and at page 85, the Supreme Court quote with approval the language of the *Oak Point Mines* case, "As to the title to the bed of the creek *below ordinary low water,* I hold that it is in the State."

The Statute of Limitations of the State of South Carolina is a Civil Code S. C., Rev. Stat. S. C., 1893, vol. 2, secs. 95 and 103:

Section 95. The State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the State to the same, unless

1. Such right or title shall have accrued within twenty years before any action or other proceeding for the same shall be commenced; or unless

2. The State, or those from whom it claims, shall have received the rents and profits of such real property or of some part thereof, within the space of twenty years.

Sec. 103. For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial enclosure.

We have quoted above the statutes confirming this colonial grant and the statute protecting rice land under the severest penalty from destruction by backing water as policy of the colony and State.

GENERAL LAW.

In *Commonwealth* vs. *Alger*, 7 Cush., 68, the Court states the doctrine that the private title to the shore or flats by Massachusetts statute allows "the public right to pass on foot over flats or places over which the sea ebbs and flows, *so long as they are not actually reclaimed and converted into tillage or mowing land.*"

P. 68, *Idem.*

Upon this last point, we may as well remark here, that the right of the riparian proprietor, under the ordinance, has always been held subject to this rule: that until he *shall build upon his flats or inclose them*, and whilst they are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation. This probably results from the general and acknowledged rights of the public to navigate the sea and all its arms and branches, and so long as the owner of the flats permits the sea to flow over them, the individual right of property in the *soil beneth does not restrain or abridge the public right to the appropriate use of them.*"

P. 75, *Idem.*

"The views, we believe, that the Courts of this State have constantly taken of the construction of the colony ordinance, are these: That it vested the property of the flats in the owner of the upland in fee, in the nature of a grant; but that it was held *subject to a general right of the public for navigation until built upon or inclosed.*"

P. 79, *Idem.*

See *Shiveley* vs. *Bowley*, 152 U. S., p. 19, as to Massachusetts law, and the same as to the law of New Jersey, Oregon, Maryland. Pp. 22, 54-56, *Idem.*

This Court has fully stated the rule in the *City of Boston, Plaintiff in Error*, vs. *David R. Lecraw*, 17 Howard, 426:

"By the old laws of Massachusetts, a littoral proprietor of land owned down to low water mark; subject, however, to the condition, that, *until he occupied the space between high and low water mark*, the public had a right to use it for the *purposes of navigation.*"

P. 426.

"This is the foundation of what may be called the common law

of Massachusetts on this subject. By it the grantee of land bounding on navigable waters where the tide ebbs and flows, acquires a legal right and a vested interest in the soil of the shore between high and *low water mark* and not a mere indulgence or gratuitous license, given without consideration and revocable at the pleasure of the grantor. See *Austin* vs. *Carter*, 1 Mass. Rep., 231, and *Commonwealth* vs. *Alger*, 7 Cush., 71.

"But the right of littoral proprietor under the ordinance has always been subject to this rule: that until he should build *upon his flats or inclose them*, and whilst they are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation."

Pp. 432-3, *Idem.*

"The exercise of the public right of navigation over the soil of defendant is fully accounted for without any presumption of grant or dedication by the owners. The public enjoyed this highway of nature by a title reaching far before the advent of the Pilgrims, and paramount to any grant to them or by them; but by the law the enjoyment of this public right was made *defeasible* by the owner of the land. *Till he reclaimed his land*, the public needed no grant or declaration by him, in order to their enjoyment of the right of navigation over it."

"The Court ought, therefore, to have instructed the jury that the public right of navigation over the land of defendant was *defeasible*."

P. 436, *Idem.*

Again in *Richardson* vs. *the City of Boston*, 19 Howard, 269, this Court say:

"But the plaintiff in that case claimed no other right of way over the lands of defendant, save the public right of navigation; and this Court decided that the *public right of navigation, between high and low water mark*, was *defeasible* at any *time by the owner of the subjacent* land. That as the space between the plaintiff's wharves had been converted into a dock by the accident of its position, *so long as it remained unreclaimed*, every person had a right to pass and repass over it. The exercise of this public right, for any length of time whatever, would therefore form no

grounds of presumption either of a public dedication or a private grant to the owners of the adjoining wharves. While it remains *unreclaimed,* it is a public highway or dock, by a *paramount but defeasible title.*"

Idem, p. 269.

"But in the present case the City of Boston is owner of the land, and has the *same right to reclaim their flats which other owners have. Before they are so reclaimed* the public and the adjoiners may exercise their *paramount right of navigation.*"

That the public trust for navigation does not attach to these reclaimed lands on the shore, is again recognized by this Court in *Illinois Central Railroad* vs. *Illinois,* 146 U. S., 387:

"It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and *grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held* by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under navigable waters of an *entire harbor* or *bay, or of a sea or lake.* Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, *except as to such parcels as are used in promoting the interests of the public* therein, or *can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.*"

P. 452-3, *Idem.*

"The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or *when*

parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

P. 453, *Idem.*

"*It is also true that portions of the submerged shores and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder.*"

P. 457, *Idem.*

By this doctrine the reclaimed and enclosed flat and shore forming part of this rice plantation, does not partake of the character of the title to the bed of the river, the channel of navigation, and no public trust attaches to it after reclamation.

This Court has again recognized the absolute private ownership, *excluding every public right* in such land:

"Having in view the manifest policy of this legislation and the force and meaning of its language, we do not hesitate to adopt the conclusion that the several grants of the State to the united companies, under the Act of March 31, 1869, to enable them to *improve their lands* under water at Kill von Kull and other places, and the grants under the general Act of the same date, under which the other defendant claim, were intended to secure to the grantees the *whole beneficial interest and estate in the property described,* for their exclusive use for the purposes expressed and intended in the grants. And, construing these conveyances most strongly in favor of the public, and yet so as not to defeat the grants themselves, we also conclude that the rights *conveyed exclude every right of use or occupancy on the part of the public in the land itself.* The land granted is specifically described by metes and bounds. The grant is a grant of the estate in the land, and not of a mere franchise or incorporeal hereditament. The uses declared are such as require an exclusive possession by the grantees, that they may hold, possess, improve and use the same for their own use and profit, according to the nature of the business which by law they are authorized to conduct. In other words, under these grants the land conveyed is held by the grantees on the same terms on which all other lands are *held by private persons under absolute* titles, and *every previous right of the State of New Jersey therein,* whether proprietary or sovereign, is transferred or extinguished,

except such sovereign rights as the State may lawfully exercise over *all other private property.*"

Hoboken vs. *Penn. R. R. Co.*, 124 U. S., 691.

This doctrine is again illustrated in the case of *Hanford et al.* vs. *St. Paul & D. R. Co.*, 44 N. W. Rep., 1144, dealing with

"The right of a riparian proprietor upon navigable waters to improve, *reclaim and occupy the submerged lands out to the point of navigability*," although originally incident to the riparian estate, may be separated therefrom, and be transferred to and enjoyed by persons having no interest in the original riparian estate. Overruling *Land Co.* vs. *Emerson*, 38 Minn., 406, 38 N. W. Rep., 300.

P. 1144.

The Court say:

"A considerable extent of the *shores*, not only along tide waters of the ocean coasts, but on our great inland waters, are of such a nature, out to and even beyond low water mark, as to be in general unavailable by the public for the purposes of navigation, and *must remain forever waste and useless lands, unless reclaimed by artificial means from the shallow water covering them, or unless otherwise improved.* It is established beyond question in this State, and in other States as well, that the proprietor of the riparian lands may make *such improvements.*"

"It is for the interest of the State that such lands, not available for the public purposes for which alone the State exercises authority over them, *shall be improved and used for profitable enterprises, rather than that they lie forever waste and unproductive.* And the State, while recognizing the ancient riparian right of occupancy, has not assumed to prescribe or to limit the purposes or manner of its enjoyment. That seems to have always been left to the discretion of the person in whom the right is exclusive, and the decided cases afford many illustrations of uses in no way connected with the purposes of navigation."

Pp. 1145-6, *Idem.*

"This right of the riparian proprietor, even before it has been in any manner exercised by reclaiming or improving the premises—the right itself to reclaim, improve or occupy—is a property right vested in him, recognized and protected in the law as property. He cannot be deprived of it without due process of law. It can-

not be taken from him, and devoted to public use, *without compensation*. *Brisbane* vs. *Railroad Co.*, 23 Minn., 114; *Carli* vs. *Railway Co.*, 28 Minn., 373, 10 N. W. Rep., 205; *Depot Etc. Co.* vs. *Brunswick*, 31 Minn., 297, 17 N. W. Rep., 626; *Yates* vs. *Milwaukee*, 10 Wall., 497; *Bell* vs. *Gough*, 23 N. J. Law, 624; *Delaplaine* vs. *Railway Co.*, 42 Wis., 214; *Lyon* vs. *Fishmonger's Co.*, L. R. 1 App., 662. Such property is subject to the law of eminent domain."

P. 1146, *Idem.*

"These peculiar property rights of the riparian owner may constitute, estimated in connection with the riparian land, the chief value of the premises. It may even be that the whole value of such real property consists in the right to *improve and occupy* the submerged lands for private purposes."

P. 1145, *Idem.*

This principle is also further expounded in *Miller* vs. *Mendenhall*, 44 N. W., 1141 (Minn.):

"In this country the generally accepted doctrine is that the *jus privatum* passes to the owner of the adjacent lands, and in this State extends to *low water mark*, with the accompanying riparian rights, while the *jus publicum* belongs to the State, which holds the title to the soil under the water as trustee. 'The sovereign is trustee for the public, and the use of navigable waters is inalienable.'"

3 Kent Comm., 427. See *Com.* vs. *Alger*, 7 Cush., 89, 93.

"The State is authorized to regulate the exercise of riparian rights in the interests of the public, and may also make concessions to private owners of possessory rights in the soil of navigable waters, the effect of which will be to give them private and exclusive rights equivalent to a grant. Gould, Waters, secs. 138-140. *While the public right of navigation and fishery may not be extinguished until the waters are excluded, yet after the submerged land is filled or occupied, the riparian owner will have the exclusive right of possession, and the entire beneficial interest.*"

The leading case of the recognition by the United States of the *vested right*, by use and occupancy of the citizen, upon improvements in a navigable river, is *Monongahela Co.* vs. *United States*, 148 U. S., 312.

This Court say:

"It appears from the foregoing statement that the Monongahela Company had, under express authority from the State of Pennsylvania, *expended large sums of money in improving* Monongahela River, by means of locks and dams."

P. 324.

The United States proceeded to take the improvements *in this navigable river*, but expressly prohibited payment for a State franchise to take tolls *in the river*, of which the Navigation Company would be deprived by the Act of Congress, without compensation.

The unanimous opinion of this Court, delivered by Justice Brewer, is

"Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the Government, is of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the Government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the Government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights."

"In the case of *Sinnickson* vs. *Johnson*, 17 N. J. L. (2 Harr.), 129, 145, cited in the case of *Pumpelley* vs. *Green Bay Company*, 13 Wall., 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner* vs. *Newburg*, 2 Johns. Ch., 162, Chancellor Kane affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon *one individual more than his just share of the*

burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned."

"But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the Government to take private property for public uses."

"And with respect to constitutional provisions of this nature, it was

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well said by Mr. Justice Bradley, speaking for the Court, in *Boyd* vs. *The United States*, 116 U. S., 616, 635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be *liberally* construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. The motto should be *absta principiis*.'"

Idem, pp. 324, 325; 148 U. S.

"The language of the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the Government, the last, the one in point here, being, 'Nor shall private property be taken for public use without just compensation.'"

Idem, p. 326.

"The theory of the Government seems to be, that the right of the Navigation Company to have *its property in the river*, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the Government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. The franchise is a *vested right*. The State has power to grant it. It may retake it, as it may take other private property, for public

uses, *upon the payment of just compensation. A like, though a superior power exists* in the National Government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can *any private property* belonging to an individual."

P. 341, *Idem.*

"The Government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the Government which takes, but *the value to the individual from whom the property is taken;* and when by the taking of the tangible property the owner is *actually deprived of the franchise* to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

P. 343, *Idem.*

The paramount authority to regulate commerce in a navigable river here had to pay compensation for the *vested right* of the citizen in the improvement and franchise. So here the claimants have vested right in actual use and occupancy and tillage of this plantation for over a hundred years, and in depriving them of this vested right in reclaimed land, improved and occupied, this use of their property granted and confirmed in grant by the State for a public benefit of reclamation and agriculture, the United States is equally under the obligation of the Fifth Amendment.

In *Scranton* vs. *Wheeler*, 179 U. S., 141, the decision that a destroyed access to navigability was not a taking, rested upon the distinction that there was no improvement or occupancy.

The Court below said in that case:

"A distinction exists between those cases where, under authority of the State, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent congressional legislation. In such case, the improvement, being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of *Monongahela Navigation Co.* vs. *United States*, 148 U. S., 312. In that case it was held that

not only must the actual property of the owner in the structure, but his franchise also, must be paid for. The plaintiff in this case before us has made no improvements for either public or private uses. No property of his has been invaded, none has been taken."

Idem, p. 146.

And this Court in holding that a denial of access to navigable water by an owner *who had not improved* or built out was not a taking of private property, carefully asserts the doctrine of *vested rights* and improvements and actual occupancy and use which would distinguish the case.

The Court say:

"The decision in *Yates* vs. *Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case. That, as we have seen, was a case in which the riparian owner *had in conformity with law erected a wharf* in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching navigable water, and not, like this, a case of the exercise in a proper manner of an admitted governmental power resulting indirectly or incidentally in the loss of the citizen's right of access to navigation—a *right never exercised by him in the construction of a wharf before the improvement in question was made by the Government.*"

Idem, p. 158.

Again the vested right of possession and use of water for irrigation is recognized by the United States not only in its statutes but in its decisions as a principle of the common law.

In *United States* vs. *Rio Grande Dam and Irrigation Company*, 174 U. S., 690, this Court quotes the Act of Congress as follows:

"Whenever, by priority of possession, rights to the use of water for mining, *agricultural*, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the *local customs*, laws and the decisions of Courts, the

possessors and owners of such *vested rights* shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

"The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws and decisions of Courts in respect to the appropriation of water. In respect to this, in *Broder* vs. *Water Company*, 101 U. S., 274, 276, it was said:

P. 704.

"It is the established doctrine of this Court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of *agricultural irrigation, in the region where such artificial use of the water was an absolute necessity*, are rights which the government had, by its conduct, recognized and encourged and was bound to protect, before the passage of the Act of 1866. We are of opinion that the section of the Act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: *Atchison* vs. *Peterson*, 20 Wall., 507; *Basey* vs. *Gallagher, Id.*, 670; *Forbes* vs. *Gracey*, 94 U. S., 762; *Jennison* vs. *Kirk*, 98 *Id.*, 453; *United States* vs. *Rio Grande Irrigation Co.*, 174 U. S., p. 704."

The colony and State of South Carolina had before the Revolution for many years encouraged this agriculture, and its peculiar industry and reclamation of these lands, by ditching, embankments and canals, and irrigation by natural flow of Savannah River. It was a part of its industrial system for nearly two hundred years, and when the United States was created there was a "pre-existing right of possession" in the occupant. The State could not now divest title and turn him out of possession. The United States which has the same but superior power (142 U. S., 341), is equally observant of private right.

And this Court concludes:

"The unquestioned rule of the common law was that every

riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent, 3 Kent. Com., sec. 439: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debat currere ut currere solebat*, is the language of the law. Though he may use the water while it runs over his lands as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

P. 702; *Id.*, 174 U. S.

It is clear, therefore, that even if the whole of the level of this plantation were between mean high water and low water mark, still being reclaimed, protected from the river by an embankment, enclosed, in actual *pedis possessio*, in adverse possession under South Carolina statute, cultivated for one hundred and twenty years and probably longer, and by grant, by local custom, by prescription, the private property of the owner, and its chief value consisting in the natural flow of the Savannah River for irrigation, the U. S. Government has no easement in the exercise of power to regulate commerce, to actually invade this property by water backed up and to destroy it and to drive the husbandman forever from the tillage of dry land, that has been productive fields for over a century.

without compensation

TENTH EXCEPTION.

The Court erred in failing to hold that the damages resulting from the ~~possession~~ of this improvement of a navigable highway, for the public good, was not the result of a taking of plaintiffs' property, and was merely incidental to the exercise of a servitude to which the property had always been subject.

prosecution

Again it is to be remarked the error of law here assigned that the injury to plaintiffs' property was merely "incidental to the

exercise to a *servitude* to which the property has always been subject" presents a question of law and a defense which was not set up in the answer. Paragraph one of the answer being simply a denial of the title set up by the plaintiff in paragraph third of the complaint. Yet notwithstanding there was no such issue in the pleadings, which defense is an affirmative defense if it be set up at all (see authorities cited), this Court is asked to consider an assignment of error on a question of law not made in the pleadings. No servitude upon this property of any kind whatsoever is alleged by the Government of the United States in the pleadings.

As matter of fact the Court below found that the injury to the lands was not *incidental*, consequential or indirect, but was direct, the "*direct result*" of the dams and obstructions, and so far as it is a matter of fact this Court has said "we have no authority to examine testimony and make a finding of the ultimate facts" (*Lehnen* vs. *Dickson*, 148 U. S., 71, 77).

Now, in Conclusion of Law Four, p. 9, Record, the Court below held:

"If, therefore, said riparian owner suffer damage, incidental or consequential upon such improvement, he cannot, under any circumstances, treat the Government as a trespasser on *tort feasor*, and cannot, under the Fifth Amendment, demand compensation, unless there is an actual physical invasion of the real estate of the private owner, and a practical ouster of his possession. *Gibson* vs. *U. S.*, 166 U. S., 269."

P. 9, Record.

There is no error alleged in this conclusion of law by the Court below.

The Court below also found the vital facts which distinguishes this case, *i. e.*,

1. The actual physical invasion by permanent flooding of the real estate of the private owner.

2. The practical ouster of his possession.

See Findings of Fact Ten and Eleven, page 8, Record.

These findings of fact make it impossible for the Court below to find as a fact, the injury was *incidental* or consequential, which is the negative of such findings. And this Court has said it cannot disregard the findings of fact of the Court below, nor itself find the ultimate fact on error of law.

Moreover, this Court has always declared that the facts of the *Pumpelley* case (which are the same as the Court below finds

here) made the case not one of incidental or consequential injury; and in the case of *Mugler* vs. *Kansas, U. S.* vs. *Gibson*, and *Scranton* vs. *Wheeler*, quoted in full above, this Court has repeatedly distinguished, recognized and affirmed the doctrine of the *Pumpelley* case, particularly pointing out and stating the crucial facts, by which it was held not incidental or consequential, to wit:

(1.) Actual in. .sion.

(2.) Permanent flooding—destruction.

(3.) Practical ouster of possession.

The Court below, therefore, could only hold as it did, on the ultimate facts found, and was following strictly the language of this Court.

Again, as matter of law, dealing with the legal merits of the exception, it has never been held that there is a servitude in the United States Government to *back up water* on lands on a navigable river and permanently flood the lands bordering on a navigable stream in the exercise of its power to regulate commerce. On the contrary, this Court has repeatedly held to the contrary. In the first and leading case of *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 166, this Court disposes of such a plea in these words: "It is alleged that this title came to the plaintiff burdened with an *easement* in favor of improving the navigation of the Fox River, which authorized *the injuries complained of*, and of which, therefore, he could not complain," to which this Court say, "that the absolute ownership and right of private property in such lands is not varied by the fact that it borders on a navigable stream," and against the affirmative plea of such easement held that the flooding of such lands must be compensated under the Constitution.

In *Gibson* vs. *U. S.*, 166 U. S., 269, the Court affirms the doctrine of the *Pumpelley* case, carefully distinguishing the *Gibson* case, on the ground that the farm, either in upland or submerged land, was not actually invaded by the water as it was backed up and the plaintiff remained in continued use and full possession and agriculture, but that the only result was a diminished access and solely an inconvenience.

The ultimate fact found by the Court below, in that case, was:

"VIII. There was *no water thrown* back on claimant's land by the building of said dike, and that said dike has not itself come into physical contact with claimant's land, and has not been *the cause of any such physical contact in any way.*"

All that was found was that "claimant's access to the navigable portion of the stream was" (partly but) "not entirely cut off."

Finding VII. of Facts, 166 U. S., 269.

This Court say:

"The Fifth Amendment to the Constitution of the United States provides that private property shall 'not be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or *a direct invasion thereof*, but the incidental consequence of the lawful and proper exercise of a governmental power."

"The applicable principle is expounded in *Transportation Co.* vs. *Chicago*, 99 U. S., 635. In that case, plaintiff being an owner of lands situated at the intersection of La Salle street in Chicago with the Chicago River, upon which it had valuable dock and warehouse accommodations, with a numerous line of steamers accustomed to land at that dock, was interrupted in his use thereof by the building of a tunnel under the Chicago River by authority of the State Legislature, in accomplishing which work it was necessary to tear up La Salle street, which precluded plaintiff from *access* to his property for a considerable time; also to build a coffer dam in the Chicago River, which excluded vessels from access to his docks; and such an injury was held to be *damnum absque injuria*. This Court said, again, in speaking through Mr. Justice Strong: 'But acts done in the proper exercise of governmental powers, and *not directly encroaching upon private property*, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542, and notes. The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 166, and in *Eaton* vs. *Boston, Concord &c. Railroad*, 51 N. H., 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. *But in the present case there was no such*

invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

And this exposition of the law is again repeated in *Scranton* vs. *Wheeler*, 179 U. S., 156, which was a case of access to navigable stream also.

Thus it appears the doctrine of the *Pumpelley* case has always been maintained, where there was an actual direct invasion and destruction of the real estate by water backed up, and a practical ouster of possession, which is the case here on the ultimate facts found by the Court below. In the light of these adjudications by this Court, the Court below did not err in failing to hold the destruction of the rice plantation "incidental."

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